

Memorandum 89-74

Subject: Administrative Matters - Relationship With Research Consultants

Background

Set out immediately below is an extract from the Commission's handbook of practices and procedures relating to the Commission's policies on research consultants.

PRESENTATIONS BY CONSULTANT TO OTHER PERSONS OR GROUPS

If the consultant makes any presentation of his or her background study and recommendations to any person or group, the consultant shall make clear at the time the presentation is made that:

(1) The consultant's recommendations are not recommendations of the Commission and do not represent the views or recommendations of the Commission.

(2) The Commission may or may not make recommendations on the particular matter and, if the Commission does make recommendations, those recommendations will be made in the Commission's printed report to the Legislature. Minutes, January 1982.

The Commission adopted this policy because a particular consultant at that time had been writing articles and giving speeches promoting the consultant's viewpoints, and giving the impression that these were the views of the Commission.

We make these observations as a preface to questions that two of our consultants have raised with the staff concerning their activities. The staff believes the Commission should review these questions.

Amicus Brief by Commission Consultant

Professor Coskran is acting as the Commission's consultant on assignment and sublease, and his background study prepared for, the Commission is published. He is the leading authority on this matter in California. As such, he has been asked to submit an amicus brief to

the California Supreme Court on a key case involving assignment and sublease. Professor Coskran has asked whether the Commission would have a problem if he were to submit an amicus brief.

The staff's feeling is that there should be no problem, so long as the professor makes no reference in the brief to the fact that he is serving as a consultant to the Commission or makes clear that the brief represents his personal views and not the views of the Commission, consistent with the general policies the Commission has previously adopted. The Commission hires consultants who are expert in a field, and one of the reasons consultants are willing to work for the Commission at minimal compensation is because of the further recognition they will receive in that field. A consultant should not be precluded from remaining professionally active in the field in which the consultant is expert.

There is the potential for political embarrassment for the Commission, since the consultant may be making recommendations on a particular matter when the consultant has taken a position for one party or another in litigation that involves the same matter. Presumably the Commission could take into account possible consultant bias in this situation if the consultant discloses the involvement in litigation. The staff believes on balance that despite the possibility of political embarrassment, the Commission should not try to limit outside activities by a consultant.

Advisory Committee to Commission Consultant

Professor Asimow is the Commission's consultant on administrative law, and is at work on the studies he is to prepare for the Commission. He's been informally seeking the views of knowledgeable persons who have different perspectives on administrative law, so that he can give the Commission well-considered and realistic proposals. He would like to give some recognition to the persons he's been consulting with, and to encourage their further input to him, by creating a more formal-sounding "advisory committee". He would like to know the Commission's reaction to this proposal.

The staff believes that the process being followed by the consultant in this case is highly desirable. If the consultant

believes it will be useful to give his informal advisors a more formal status, that should be allowed.

Once again, however, it should be made clear that while the input is being sought by the Commission's consultant, the consultant is acting as an individual and does not speak for the Commission. It is the consultant's advisory committee, not the Commission's, and the consultant determines the committee's composition. We will ask the consultant to advise us of the composition of the committee at the time we receive the study, so that the Commission will have some sense of the kind of input received by the consultant in developing the materials that are submitted to the Commission.

Conclusion

Whatever the Commission decides on these matters, the staff believes they should be adopted as general policy in the Commission's handbook, for future guidance.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary